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No. 91-1395

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

THE CELOTEX CORPORATION

Petitioner,

v.

WILLIAM EARL GLASSCOCK, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF OF PETITIONER THE CELOTEX CORPORATION

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Respondents' Brief in Opposition is long on rhetoric but short on any meaningful response to the issues raised in the Petition for Writ of Certiorari filed by Petitioner The Celotex Corporation[1] ("Celotex"). What is most striking about the Brief in Opposition is that it entirely fails to respond to the issues and cases upon which Celotex relies.

I. *HASLIP* DOES NOT PROVIDE ADEQUATE GUIDANCE TO THE LOWER COURTS

The question of whether this Court's decision in *Pacific Mutual Life Insurance Co. v. Haslip,* 111 S.Ct. 1032 (1991) provides sufficient guidance to the lower courts to enable them to resolve due process challenges to punitive damage awards is a question this Court must resolve promptly. As indicated by the frequency and size of punitive damage awards that continue to inundate the courts of this country, A31-34, the courts who must deal with the imposition and review of punitive damage awards on a daily basis need further assistance to define the limitations due process places on punitive damage awards.

1 Celotex's statement pursuant to Rule 29.1 can be found at page iii of Celotex's Petition.

Respondents make no effort to address cases from the state and lower federal courts that contain cries for help, such as *George v. International Society for Krishna Consciousness*, Cal. Rptr. 2d , 1992 WL 13838, at *34 (Cal. App. 1992), which noted that "[o]ther than explaining that Alabama's procedure passes constitutional muster, Haslip offers little guidance as to what would be necessary to render a different system unconstitutional." Respondents make no effort to reconcile this Court's requirement in *Haslip* that punitive damage awards must "have some understandable relationship to compensatory damages," 111 S.Ct. at 1045, with cases such as *Southern Life and Health Insurance Co. v. Turner*, 586 So.2d 854, 858 (Ala. 1991), in which the Alabama Supreme Court—the very jurisdiction whose system was reviewed in *Haslip*—asserted that it has "repeatedly held that punitive damages need not necessarily bear any relationship to compensatory damages." Respondents also make no efforts to explain or justify how due process requirements enunciated in *Haslip* can be met by the widely varying punitive damage multiplier ratios that have been routinely upheld since *Haslip*, A31-32, or how concerns of fairness and reasonableness can be met in a case in which a series of punitive damage awards vary by a factor of more than eighteen.

In short, Respondents' self-serving and conclusory statements that the lower courts are properly applying *Haslip* are belied by the judgments of the lower courts and the results that they affirm. Because of the complexity of the due process issues, this Court must do more than merely decide that the Alabama system considered in *Haslip* passed constitutional muster. This Court must provide additional illumination regarding the threshold at which punitive damage awards exceed the limits of due process.

II. TEXAS LAW DOES NOT PROVIDE SUFFICIENT LIMITS ON JURY DISCRETION IN AWARDING PUNITIVE DAMAGES

Respondents incorrectly compare the punitive damage awards in this case to the total compensatory awards made to each Plaintiff. Whether a punitive damage award is reasonably

proportionate to the compensatory damage award is determined by comparing the punitive award against a particular defendant to that defendant's "allocated share of actual damages." *Edwards v. Armstrong World Indus., Inc.*, 911 F.2d 1151, 1154 (5th Cir. 1990); *John Deere Co. v. May*, 773 S.W.2d 369, 377-78 (Tex. App. —Waco 1989, writ denied). Thus, the punitive damage ratios in this case range from a high of 200:1 to a low of approximately 7:1, as set forth on page 3 of Celotex's Petition.

Respondents make much of the decision in *Alamo National Bank v. Krause*, 616 S.W.2d 908 (Tex. 1981), setting forth factors that a reviewing court can consider when reviewing punitive damage awards for excessiveness. In fact, Respondents represent to this Court that, under Texas law, "the trial court and the appellate court *must* consider at least" the factors set forth in *Alamo National Bank*. Brief in Opposition at 7 (emphasis in original). But nothing in *Alamo National Bank* makes consideration of those factors mandatory; at least one Texas court of appeals recognizes the *Alamo National Bank* factors are merely guidelines "which should be considered," *General Chemical Corp. v. De La Lastra*, 815 S.W.2d 750, 758 (Tex. App.—Corpus Christi 1991, no writ), not that they *must* be considered. Indeed, despite the mechanical invocation of the *Alamo National Bank* decision, Texas courts continually maintain that standards for review of punitive damage awards are merely "a tool to aid the courts in determining when an exemplary damage award is the product of passion rather than reason." *Wright v. Gifford-Hill & Co., Inc.*, 725 S.W.2d 712, 714 (Tex. 1987) (quoting *Tynberg v. Cohen*, 13 S.W. 315, 316 (Tex. 1890)). *See also Marathon Oil Co. v. Sterner*, 777 S.W.2d 128, 132-133 (Tex. App.—Houston [14th Dist.] 1989, no writ). Further, Texas law does not require that a jury be instructed on any of the factors contained in the *Alamo National Bank* decision.

Respondents ignore the admissions by both state and federal courts that the Texas system for review of punitive awards provides no objective standards for judicial review. The Fifth Circuit, in this very case, recited that it would apply the *Alamo National Bank* standards but then emphasized "the difficulty in

applying this test," A-17, as well as "the inherent problems with the purely subjective Texas rule." *Id.* In *State Farm Mutual Automobile Insurance Co. v. Zubiate,* 808 S.W.2d 590 (Tex. App. —El Paso 1991, no writ), the appellate court could not give any objective criteria to use in review of punitive damage awards. Instead, the *Zubiate* court rhetorically asked itself why a punitive award that was 91 times the compensatory award was excessive, and could only answer, "*Because it just is.*" 808 S.W.2d at 605 (emphasis in original). In his concurrence, Chief Justice Osborn was even more direct when he recognized that "in awarding the exemplary damages, the jury's determination is an arbitrary process without any objective standards," and that the *Alamo National Bank* standards do not give "either the jury or the appellate court any standards by which to make a proper determination of" the amount of punitive damages. 808 S.W.2d at 606.

Respondents' discussion of the jury issue given in this case also side-steps the real issue. As the excerpt at pp. 8-9 of the Brief in Opposition shows, most of the jury instruction regarding punitive damages focused on the state of mind necessary to support an award of punitive damages under Texas law. The jury was encouraged to exercise its unrestrained discretion when it was told to consider "the totality of the circumstances." The *only* objective factor that the jury was told to consider was the financial resources of the defendant. This Court can obviously recognize the crucial differences between the jury instruction reviewed in *Haslip* and the instruction which the trial court gave in this case.

Despite Respondents' unsupported statements to the contrary, the judges that must try to apply the Texas system of punitive damages admit that it is arbitrary, subjective, and lacking in meaningful standards. The Texas system of punitive damages is founded on precisely the type of unrestrained and unguided jury discretion that due process, as well as this Court's decision in *Haslip,* condemns.

III. DUE PROCESS LIMITS THE REPEATED AWARD OF PUNITIVE DAMAGES AGAINST A SINGLE DEFENDANT FOR A SINGLE COURSE OF CONDUCT

Respondents attempt to justify the serial award of punitive damages against a single defendant for a single course of conduct by the non sequitur that each award of punitive damages "has been specifically related to an individual plaintiff." Brief in Opposition at 12. This response fails for two reasons. First, it is an attempt by Respondents to incorrectly shift the focus of punitive damage awards from the conduct of the defendant to that of the plaintiff. Second, it completely ignores the fact that repeated punitive damage awards are totally inconsistent with any reasonable purpose that is alleged to underlie the imposition of punitive damage awards.

Respondents also claim that prior Fifth Circuit decisions have rejected Celotex's due process argument concerning multiple punitive damage awards. This is incorrect, because the Fifth Circuit has failed to ever address the due process limitations of multiple punitive damage awards. Instead, the Fifth Circuit originally based its ruling upon Mississippi state law grounds. *Jackson v. Johns-Manville Sales Corp.*, 781 F.2d 394, 415 (5th Cir. 1986) (en banc). Other cases since that time felt bound by the *Jackson* decision, although some panels of the Fifth Circuit have followed *Jackson* only after stating their "misgivings" with the holding on this very issue. *King v. Armstrong World Indus., Inc.*, 906 F.2d 1022, 1033 (5th Cir. 1990), *cert. denied,* 111 S.Ct. 2236 (1991). The Fifth Circuit has never addressed the due process limitations on multiple punitive damage awards on the merits, and Respondents have not even tried to address the many decisions that have found due process violations in repeated punitive damage awards that are discussed at pages 17-18 of Celotex's Petition.

Respondents seemingly place some importance on the fact that this Court denied Celotex's Petition for Writ of Certiorari in the *King* case. However, as this Court has had to state repeatedly, the denial of a writ of certiorari constitutes no expression of opinion upon the merits of the case. *Teague v. Lane,* 489 U.S. 288, 296

(1989); *Hopfmann v. Connolly,* 471 U.S. 459, 461 (1985) (per curiam). *See Maryland v. Baltimore Radio Show, Inc.,* 338 U.S. 912, 917-18 (Frankfurter, J.).

CONCLUSION

For the reasons set forth in its Petition for Writ of Certiorari, The Celotex Corporation requests that the judgment against it be modified to deny any recovery of punitive damages or, alternatively, that the judgment be vacated and the cause remanded for further proceedings.

Respectfully submitted,

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